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No. 09-278

Supreme Court, U.S.
FILED
OCT 5 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSE A. RIVAS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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October 5, 2009

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QUESTION PRESENTED

Whether Ohio's discovery rule, which protects otherwise confidential law enforcement investigatory records from copying and release in the absence of a prima facie showing that the state has already provided false, incomplete, adulterated, or spoilated evidence, violates the Due Process Clause of the United States Constitution?

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STATEMENT

1. In 2005, Detective Alonzo Wilson of the Xenia, Ohio Police Department was posing as a 14-year-old girl on an internet chat room. The Petitioner, Jose A. Rivas, then 36, solicited sex from this purported 14-year-old and drove from Cincinnati, Ohio to Xenia, Ohio to meet her at a hotel. The Defendant was indicted for Importuning, a violation of Ohio Revised Code (O.R.C.) 2907.07(D)(2), a felony in the fifth degree; and Attempted Unlawful Sexual Conduct With a Minor, a violation of O.R.C. 2907.04(A), a felony in the fourth degree.

During the pre-trial proceedings, the Petitioner filed a motion to compel inspection and copying of the Xenia Police Department's computer hard drive under Ohio Rule of Criminal Procedure 16. The trial court held a hearing on the motion, and the Petitioner called his expert, Mark T. Vassel, to testify. Mr. Vassel testified that the only way for him to examine the State's evidence against Petitioner is for him to have a "mirror image" of the police department's computer hard drive. Vassel testified that a mirror image is the only way to ensure that the electronic copy of evidence previously provided by the State on compact disc was not compromised in any way.

The trial court overruled the motion to compel, finding that the Petitioner offered no evidence or testimony to indicate that the electronic copy provided was compromised. The Court further noted that the Petitioner could have compared the evidence provided to his own hard drive, but the Petitioner destroyed or disposed of his own hard drive. The case proceeded to trial. Detective Wilson testified at the trial and the

Petitioner was found guilty as alleged in both counts of the indictment.

It is important to note that the Petitioner never requested to examine the State's computer in the custody and control of the State. The Petitioner insisted on obtaining a copy of the police department's hard drive, which also contained pending and ongoing investigations of other suspects.

2. The Petitioner appealed the trial court's ruling to the Court of Appeals of Ohio, Second Appellate District alleging the following assignments of error: 1.) The trial court erred in denying appellant's motion to compel inspection and copying of the computer hard drive; and 2.) The trial court erred in admitting into evidence at trial the State's unauthenticated paper printouts of electronic data. The Second District affirmed the first assignment of error and held that the trial court erred in overruling the Petitioner's Motion to Compel because:

> [w]hile the State insists that their witnesses verified the accuracy of the copies, a defendant should not be required to take the word of the adverse party - the police in this case - that a transcript of information stored on a hard drive is accurate, especially where that information constitutes the very crime that the defendant is alleged to have committed.

3. Respondent, the State of Ohio, appealed this decision to the Ohio Supreme Court, arguing that the Court of Appeals abused its discretion and substituted its judgment for that of the trial court, and that the concerns raised by Petitioner regarding the evidence

were unfounded based upon the record. The State further sought to protect this sort of evidence from unnecessary disclosure to multiple parties, especially when other portions of the hard drive contained active investigations, officer screen names, and investigatory techniques. Further complicating the disclosure of this material is that some of the other investigations contained on the hard drive involve pornagraphic images, including those of children, which the State cannot copy without violating federal laws against child pornography. See *State v. Brady*, 119 Ohio St. 3d 375, 2008-Ohio-4493. The State reasoned that this is a unique case where there will always be two copies of the original chat transcript - one on law enforcement's hard drive and the other on the computer used by the defendant.

The Supreme Court of Ohio agreed, and held that where a party has received discovery pursuant to Ohio Crim. R. 16(B)(1)(c), a trial court will not order a production of a mirror image of a computer hard drive without a prima facie showing that false, incomplete, adulterated, or spoilated evidence has been provided. *State v. Rivas*, 121 Ohio St. 3d 469, 2009-Ohio-1354, at ¶20. The Court further specifically found that this was not a case involving the denial of due process since the State fully complied with Ohio's Rules of Discovery. *Id.* at ¶18.

Respondent - State of Ohio agrees that there is no due process violation in imposing a burden upon a defendant to show that he is entitled to more discovery than the procedural rules allow. The Respondent further submits that there is no per se Constitutional right to discovery, and that state discovery rules that do not violate due process are best left to State courts

to interpret and enforce under the Tenth Amendment. Further, a state government has a legitimate interest in protecting the hard drives of their investigatory computers, and the lower court's holding effectively balances that need with the need for a defendant to examine the evidence against him. Accordingly, there is no Constitutional question in this case and there is no need for this Court to accept certiorari.

REASONS FOR DENYING THE PETITION

I. There is no need for this Court to accept certiorari in this case, as there is no Constitutional issue. Further, certiorari is not appropriate in this matter as the Petitioner's arguments are belied by the record.

Petitioner is asking this Court to read into the Sixth and Fourteenth Amendments of the Constitution of the United States a defendant's right to examine the prosecution's physical trial evidence against him. Respondent respectfully submits that holding so would undermine the long-recognized rule allowing a state to regulate criminal procedural matters. This Court has previously held that, "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952);

Snyder v. Massachusetts, 291 U.S. 97." *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

A discovery rule that imposes an easily attainable burden on a defendant to obtain evidence in addition to what is required under the rules of discovery is hardly offensive to the fundamentals of our justice system. It is the position of the Respondent that if the record were not so devoid of any evidence of impropriety on the part of the Detective, the Petitioner would have easily met his burden and been permitted to examine the hard drive. Indeed, the rule as announced by the Supreme Court of Ohio does not prevent disclosure of a law enforcement hard drive in all cases, just in those cases where the record does not support disclosure.

The concerns of the Petitioner in this case are not supported by evidence in the record. The Petitioner's essential argument at the motion to compel discovery is that the transcript of the online chat submitted by the police in discovery was altered, without any support whatsoever, during the booting and rebooting of the computer, and transposed the age of the person that Rivas believed he was chatting with from 41 to 14. Petitioner's expert testified that the only way that he could verify that the chat was accurate was to examine a mirror image of the law enforcement's hard drive. The record reveals however that Detective Wilson printed out the chat transcript immediately after finishing the chat and did not boot or reboot the computer between finishing the chat and printing the transcript. (Tr. 8/11/05, p.19). Further, Petitioner's expert conceded that if the chat transcripts in question were printed immediately after the chat, and the Detective testified under oath that the transcripts

were a fair and accurate representation of the conversation he had with the Petitioner, the question of the integrity of the chats and the hard drive are diminished. (*Id.*, p. 62, 68).

Additionally, throughout the chats, the Petitioner engages in numerous conversations with "Molly" about school, homework, and getting in trouble with her grandmother. It is doubtful that any 41 year old woman would be worried about getting in trouble with her grandmother for checking her email before doing homework. Therefore, even if the computer somehow magically transposed 41 to 14, there is no evidence that it could invent the language contained in the rest of the transcript.

Moreover, the Petitioner sent a naked picture of a much younger man during the initial chat and told "Molly" that he was 19 instead of 36. It is not logical that he would be concerned about appearing younger if he is having a conversation with a 41 year old. The Detective also sent the Petitioner a picture of a present day adult when she was 14 year old girl. Finally, the Petitioner's own hard drive contained the same chat log as the Detective's. If the transcript truly revealed that the Petitioner believed he was talking with a 41 year old woman, it is not likely that he would have erased it. As such, the trial court appropriately held that he was not entitled to the production of the hard drive, absent a showing of some defect. Again, his own witness testified that if the Detective printed the chat logs almost immediately after the conclusion of the chat, and he reviewed the logs and found that they represent an accurate replication of the conversations with the Petitioner, his concerns as to authenticity are minimized or eliminated. (TR 8/15/05 p.68)

Moreover, the State disagrees with Petitioner's assertion that *Brady v. Maryland*, 373 U.S. 83 (1963) does not resolve this issue. Under *Brady*, it is well-settled that if the state has in its possession any evidence material to guilt or innocence that is favorable to a criminal defendant and fails to disclose this to a defendant, a prosecutor violates due process. An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles v. Maryland,* 386 U.S. 66, 117, 87 S.Ct. 793, 818, 17 L.Ed.2d 737 (1967) (dissenting opinion). Thus, *Brady* imposes a duty upon all state and federal prosecutors to disclose all favorable material evidence to an accused, and prosecutors should be presumed to comply with this rule and the rules of discovery.

The case at bar does not change the rule in *Brady*. It merely holds that if a criminal defendant wants a copy of law enforcement's entire hard drive, which is more than what is required under the rules of discovery, he or she must make a prima facie showing that the evidence already provided is inaccurate. This showing is not unduly burdensome in this case as a defendant will always have access to the other original transcript of the chat on the computer he used. All he would have to do is print out a transcript of the chat log as he perceived it, and submit it to the court for consideration, or demonstrate that the police procedures employed were defective or compromised the evidence. That would certainly be sufficient to meet the prima facie showing. The fact that the Petitioner destroyed his own hard drive after arrest is hardly reason to hold that the state should be compelled to produce a copy of its hard drive, absent

any other evidence that it is inaccurate or spoilated, nor should it create a constitutional right to copy otherwise confidential evidence.

II. The holding of the Supreme Court of Ohio below does not violate the Sixth Amendment right of confrontation.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court interpreted the Sixth Amendment right to confront witnesses to mean that a witness's testimony against a defendant is inadmissible unless the witness appears at trial, or if unavailable, the defendant had a prior opportunity to cross-examine the witness. *Id.* at 54. In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), this Court recently extended the principles of Crawford to apply to affidavits, prepared out of court by forensic scientists, regarding the chemical make-up and quantities of suspected drugs. At issue in *Melendez-Diaz* is a Massachusetts statute that allowed for the admission of affidavits of forensic chemists in drug cases in lieu of any testimony, and if a defendant wanted the testimony of the chemist, the defendant (and not the state or commonwealth) would have to subpoena the chemist.

The State of Ohio submits that this line of cases have no application to the case at bar. Indeed, this Court has previously held that the ability to question an adverse witness under the Confrontation Clause does not include power to require pre-trial disclosure of any and all information that might be useful *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987). Detective Wilson chatted with the Petitioner online, printed out the transcript, and testified to his recollection of the conversation, and also testified that

the printed transcript fairly and accurately represented the conversation with the Petitioner. Detective Wilson is the witness against the Petitioner and the Petitioner not only had the opportunity to cross-examine him, but did cross-examine him.

III. The holding of the Supreme Court of Ohio below does not violate the Fourteenth Amendment right to due process.

There is simply no evidence in the record to demonstrate that the Petitioner was denied a fair trial. A criminal defendant has a due process right to discovery of evidence that is material to that defendant's guilt or punishment. *State v. Hesson* (1996), 110 Ohio App. 3d 845, qtg. *Brady v. Maryland* (1963), 373 U.S. 83. However, this Court has previously defined the category of criminal law infractions that violate 'fundamental fairness' very narrowly based on the recognition that, "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Medina v. California*, 505 U.S. 437,443 (1992), qtg. *Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990); accord, *United States v. Lovasco,* 431 U.S. 783, 790, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977). In *Medina*, this Court further noted that the Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. *Medina*, 505 U.S. at 443. "[I]t has never been thought

that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Id.*, qtg. *Spencer v. Texas,* 385 U.S. 554, 564 (1967).

Further, the right to discovery does not entitle a defendant "to the pre-trial disclosure of all information that might be useful in contradicting unfavorable testimony and does not enable her to search through all of the state's files" *Hesson*, 110 Ohio App. 3d 845, qtg. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie*, this Court held that a defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the state's or commonwealth's files. *Id.* at 59. This Court further noted:

> Although the eye of an advocate may be helpful to a defendant in ferreting out information, *Dennis v. United States,* 384 U.S. 855, 875 (1966), this Court has never held-even in the absence of a statute restricting disclosure-that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.

> See *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"). *Id.* at 59-60.

It is clear then, that the rule of criminal procedure in the case at bar only violates due process if it is Constitutionally impermissible to place a burden on a defendant to make a prima facie showing that the evidence already provided is false, incomplete, adulterated or spoilated before allowing said defendant access to additional information. This simply cannot be in light of the fact that the burden placed upon the Respondent is slight and Constitutionally sound, especially when compared to cases involving the destruction of evidence.

When evidence is destroyed in a criminal case before the completion of the case, courts apply two different standards depending on whether the evidence destroyed was materially exculpatory or potentially useful. *See Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988). To be materially exculpatory, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534 (1984). Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *State v. Scurlock* , Licking App. 05 CA 116, 2006 Ohio 4445, ¶29, *qtg. State v. Johnson* (1988) 39 Ohio St. 3d 48, 529 N.E. 2d 898, ¶5 of the syllabus. If the State

fails to preserve evidence that is materially exculpatory, the defendant's rights have been violated; however, courts have consistently held that the burden of proof is on the defendant to show the exculpatory nature of the destroyed evidence. See *Id.*

In contrast, if the State fails to preserve evidence that is potentially useful, the defendant's rights have been violated only upon a showing of bad faith. *Id.* at ¶30. 'Bad faith' implies something more than bad judgment or negligence, it imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud and embraces actual intent to mislead or deceive another. *Id.* Again, the burden is on the defendant to show 'bad faith' on the part of the State when dealing with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

Thus, if it is Constitutionally permissible to impose a burden on a defendant to make a showing that evidence is material or the State is acting in bad faith, it then follows that it is permissible to require a defendant to make a prima facie showing that the evidence presented by the State is false, incomplete, adulterated, or spoilated.

CONCLUSION

Given the entire record and Detective Wilson's testimony in the case at bar, there is no reasonable probability the result of the trial would have been different had the Defendant been granted access to the Xenia Police Department's hard drive. Accordingly, there has been no violation of the Petitioner's Confrontation or Due Process rights. Further, the burden placed upon the Petitioner is slight when compared to the government's need for maintaining the confidentiality of its other current investigations. Therefore, there is no Constitutional deprivation by the holding of the Supreme Court of Ohio and this Court should deny Certiorari.

Respectfully Submitted,

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